BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANDRES RANGEL	)	
Claimant	)	
	)	
VS.	)	Docket No. 258,924
	)	
EXCEL CORPORATION	)	
Self-Insured Respondent	)	

ORDER

Claimant requested review of the May 26, 2004 Award by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on October 19, 2004.

APPEARANCES

Conn Felix Sanchez of Kansas City, Kansas, appeared for the claimant. D. Shane Bangerter of Dodge City, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, during oral argument the parties agreed that the ALJ's finding that claimant sustained an 18 percent functional impairment should be affirmed.

ISSUES

The ALJ awarded claimant an 18 percent permanent partial impairment to the body as a whole for injuries sustained in a compensable injury on June 8, 2000, and based upon the opinions offered by Dr. Mark Williams, the court ordered independent medical examiner. The ALJ went on to conclude "[t]he claimant is not entitled to a work disability. The respondent did accommodate the restrictions given to the claimant and were willing to make modifications to accommodate the restrictions given by Dr. Williams as well as implement his suggested modifications."[1] The ALJ also denied claimant's request for temporary total disability benefits for the period October 3, 2002 to November 18, 2002. Claimant's benefits were calculated based upon an average weekly wage of $472.68.

[1] ALJ Award (May 26, 2004) at 6.

The claimant requests review of this decision alleging he is entitled to a 93.7 percent work disability based upon his actual wage loss of 100 percent and an 87.5 percent task loss. Claimant also maintains he is entitled to 6.57 weeks of temporary total disability benefits and asserts that the ALJ erroneously calculated his average weekly wage.

Respondent contends the ALJ's Award should be affirmed in all respects.

The issues to be determined are as follows:

1. Whether claimant is limited to his functional impairment or, as claimant contends, entitled to work disability under K.S.A. 44-510e(a);

2. Whether claimant is entitled to temporary total disability benefits for 6.57 weeks from October 3, 2002 to November 18, 2002; and

3. Claimant's correct average weekly wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award adequately sets forth the facts and circumstances surrounding claimant's accidental injury on the stipulated date of June 8, 2000, therefore the Board adopts those findings as its own. Highly distilled, claimant injured his shoulder and back in an accidental injury on June 8, 2000. Claimant was given restrictions by the treating physician(s) and at all times, those restrictions were honored. On August 22, 2002, claimant was issued permanent restrictions. Those restrictions were no repetitive bending, stooping or kneeling, no lifting more than 30 pounds occasionally, 20 pounds frequently and 10 pounds constantly, as well as no picking up anything from the floor. In addition, claimant was to be allowed to sit as needed. Dr. J. Raymundo Villanueva recommended that claimant be allowed to "work some and stand up some, and of course even to rest in the sitting position."[2]

Consistent with the respondent's policy, claimant toured through the plant after his release. He was placed in a job that required him to use a knife to trim and dejoint tails, hearts, livers and sweetbreads. Claimant worked at this job until September 30, 2002. At that point, he complained of pain and, again consistent with company policy, was placed on medical leave until such time as another position could be found.

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[2] Villanueva Depo., Ex. 1 at 65 (August 22, 2002 Report).

On November 13, 2002, claimant was notified that respondent had identified another job available within his restrictions. Claimant returned to work and was assigned the job of upgrader. A videotape depicting the duties involved in the upgrader job was reviewed and considered by Dr. Villanueva, the physician who had treated claimant since April 1999. Dr. Villanueva testified that he believed the job was within claimant's restrictions. According to Dr. Villanueva:

> ...that job could be done in the standing position, picking up small pieces of product, throwing them to a combo. In that position the worker was doing very little movement with upper extremities. There was no need to do any bending and stooping or twisting of the trunk, and the worker didn't have to do any movements at or above the shoulder level or have to reach beyond 18 inches from the body, so again, this type of work was well within the restrictions that Mr. Rangel had.[3]

Dr. Villanueva was not the only physician to express that opinion. Dr. Williams, the independent medical examiner, reviewed the tape as well and testified that as long as claimant had a stool available to him allowing him to shift his weight and sit or stand as needed, he should be able to do the job.[4] Dr. William's position on this issue presumes that the speed depicted on the tape was consistent with that expected of the claimant.[5]

Claimant worked that job until November 25, 2002 although, claimant maintains that job was not within his restrictions as it was too confining and did not allow him to move about. On November 25, 2002, claimant met with Thomas Oldfather and was advised that he was underperforming, working at 30 percent of what was necessary. Claimant was advised that he had a two week "ramp up" period and was asked if he thought he was going to be able to do the upgrader job at the desired pace. Claimant responded that he was in pain and as a result, he was again placed on medical leave. Claimant was also seen by Dr. Villanueva to determine if his restrictions were appropriate or if another injury had occurred. Dr. Villanueva testified that claimant had not reinjured himself and his restrictions did not require adjustment.[6] He maintains claimant should have been able to perform the upgrader job.

Claimant has not returned to work for respondent since that date although respondent repeatedly made it clear that claimant's job had been held open and that work would be made available within his restrictions.[7] In fact, up to the time of the regular

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[3] *Id.* at 6.

[4] Williams Depo. at 15.

[5] *Id.* at 19.

[6] Villanueva Depo. at 7.

[7] Respondent's Brief (filed August 2, 2004).

hearing, claimant continued to receive fringe benefits from respondent. Claimant admits he's done little in terms of attempting to find another job. He has applied at a roofing company and for driving jobs at feed yards, but thus far his job search has been unsuccessful. He testified that he discloses his restrictions to them and no one will offer him a job.[8]

Claimant believes he is entitled to work disability benefits beyond the stipulated 18 percent functional impairment as he contends he was unable to perform his accommodated job in the upgrader position and has sustained a wage loss as a result.

Permanent partial general disability is determined by the formula set forth in K.S.A. 1999 Supp. 44-510e, which provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

This statute must be read in light of *Foulk* and *Copeland*.[9] In *Foulk,* the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury. If a finding is made that a claimant has not made a good faith effort to find post-injury employment, then the fact finder must determine an appropriate post-injury wage based on all the evidence before it.

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[8] R.H. Trans. at 17.

[9] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995); *Copeland v. Johnson Group, Inc.,* 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

Here, claimant attempted at least two separate jobs following his release from treatment and a tour of the plant. After attempting the first job the company physician, Dr. Villaneuva, concluded was within his restrictions, claimant complained of pain and was placed on medical leave as of October 3, 2002. Some weeks later claimant was then notified that another accommodated position, that of an upgrader, was available within his restrictions. While he attempted that job, claimant maintains it was not within his restrictions as it was too confining and did not allow him to move around. He also suggests they purposely removed the chair that would have allowed him to sit as needed. This argument seems to have come about late in the process and he never brought this up with any of his superiors. Claimant thus argues that he put forth a good faith, albeit unsuccessful effort to perform both of these accommodated jobs and that this effort entitles him to work disability benefits based upon his resulting wage loss.

The ALJ concluded respondent had accommodated claimant's restrictions in the job as an upgrader and as a result, apparently concluded claimant had demonstrated a lack of good faith in retaining his position with respondent. The ALJ must have then imputed a comparable wage to claimant under the principles set forth in *Foulk* and *Copeland* because she found claimant was not entitled to a work disability. The Board agrees with this finding.

K.S.A. 1999 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends." K.S.A. 1999 Supp. 44-508(g) finds burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." Included among the issues which claimant is required to prove is wage loss as he is not entitled to work disability unless and until he can establish that he is unable to earn a comparable wage.[10] Claimant is also required to establish the "good faith" necessary under *Foulk* in order to avoid the imputation of an average weekly wage for purposes of the wage loss prong of the work disability computation.

The Board has reviewed the record and concludes that claimant has failed to establish the good faith effort to retain his employment with respondent as required under *Foulk*. Respondent made every effort to place claimant in accommodated positions following his return to work and continues to be willing to do so. On one hand claimant admits he is not looking for work, but then during the regular hearing he indicated he had looked for work at a few places, including a roofing company and at the local feed yards. The Board finds these efforts, even if true, to be far less than the good faith required under Kansas law. Thus, a wage must be imputed to him.

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[10] See K.S.A. 1999 Supp. 44-510e(a).

Unfortunately, the record does not reveal the wages that were paid for the jobs claimant applied for, or for that matter, the wage paid at the accommodated positions offered by respondent. In denying claimant's request for work disability benefits the ALJ seemed to assume that the upgrader position paid a comparable wage and that claimant failed to exercise good faith in performing and retaining that job. The ALJ's assumption seems reasonable as the claimant failed to prove that any of the accommodated positions paid less than a comparable wage. Thus, the Board affirms the ALJ's decision to deny claimant's request for work disability benefits. In doing so, the Board specifically imputes the wage available to claimant in the upgrader position and finds that it is at least 90% of his pre-existing average weekly wage. Thus, under K.S.A. 1999 Supp. 44-510e(a) claimant is not entitled to work disability benefits.

The Board notes that claimant's performance of 30 percent at optimum capacity in the upgrader job, standing alone, is not necessarily a lack of good faith. Rather, it is the combination of claimant's lack of serious job searching coupled with respondent's demonstrated willingness to place claimant in accommodated jobs and continue to work with him to advance his performance and maintain his employment and claimant's failure to work with respondent to find a suitable job, that gives rise to a finding that claimant has exhibited a lack of good faith.

Claimant also contends he is entitled to temporary total disability benefits for the period October 3, 2002 to November 18, 2002 when he was sent home while respondent was finding another accommodated position for him.[11] The ALJ denied claimant's request apparently reasoning that the position was within the restrictions imposed by Dr. Villanueva and Dr. Pedro Murati and specifically approved by Dr. Villanueva.

The Board has reviewed the record as a whole and concludes claimant is entitled to temporary total disability benefits for the disputed period. As an injured employee for respondent, claimant has the right to assert a restricted duty card when he believes he is unable to perform the job assigned to him. The record indicates claimant was unable to do the work and advised his superiors. He was taken off work and placed on medical leave. The Board believes claimant is entitled to temporary total disability benefits for that period he was unable to work at this accommodated job. Thus, the ALJ's finding on the issue of temporary total disability benefits is reversed and claimant is awarded the 6.57 weeks of temporary total disability benefits.

Finally, the Board has considered claimant's argument regarding the ALJ's calculation of the average weekly wage and agrees with claimant's suggested calculations. Claimant's average weekly wage is $478.64 based upon claimant's base wage of $385.60 and average weekly overtime pay of $93.04. The ALJ's finding on the issue of average weekly wage is modified to reflect a corrected average weekly wage of $478.64.

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[11] Claimant's counsel erroneously refers to this as temporary *partial* disability benefits.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated May 26, 2004, is affirmed in part and modified in part as follows:

The claimant is entitled to 6.57 weeks of temporary total disability compensation at the rate of $319.11 per week or $2,096.55 followed by 74.7 weeks of permanent partial disability compensation at the rate of $319.11 per week or $23,837.52 for an 18 percent permanent partial (functional) disability, making a total award of $25,934.07.

As of November 16, 2004 there would be due and owing to the claimant 6.57 weeks of temporary total disability compensation at the rate of $319.11 per week in the sum of $2,096.55 plus permanent partial disability compensation at the rate of $319.11 per week in the sum of $23,837.52 for a total due and owing of $25,934.07, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of November 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Conn Felix Sanchez, Attorney for Claimant
D. Shane Bangerter, Attorney for Self-Insured Respondent
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director